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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
Petitioner,

vs.

CHARLES T. McKEOWN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Matter Involved.

Besides the facts stated by petitioner, respondent wishes to emphasize that in his employment in question he was engaged in checking and sometimes, but infrequently, handling the freight which passed over petitioner's dock on which there were employed approximately 50 to 60 men [R. 16, 23, 24], and that by stipulation between parties the trial court found that respondent's activities therein "were concerned with and connected with interstate commerce to the extent of 7%" of his "total activities during each and every day of each and every week of his said employment" [R. 24, 25].

The Question Presented.

Respondent takes issue with petitioner's statement of the question which the latter has confined to whether it, as an employer, is subject to the Fair Labor Standards Act (hereinafter called the "Act"). It is only necessary and proper to decide here the question:

> "Is a freight checker for a motor transportation line covered by the Act when his activities in his employment 'were concerned with and connected with interstate commerce to the extent of 7% of' his 'total activities during each and every day of each and every week in his said employment?'" (*Kirschbaum v. Walling,* 316 U. S. 517.)

Reasons Why Writ Should Not be Granted.

(1) Petitioner's attempt to have the Court exempt a common carrier motor freight line engaged in transportation, and in interstate commerce to the extent of at least 7% of its total business, as a "local" business is rather unique to say the least, and respondent is rather at a loss to understand why petitioner cited *10 East 40th Street Building v. Callus,* 89 Sup. Ct. 1244 (decided June 11, 1945) as giving any aid or comfort to its contention. In this *Callus* case this Court held that the plaintiff's occupation was not "necessary to the production of goods for commerce," and it did not in any manner turn on whether or not 7%, or any other percentage, would make a business "local."

Petitioner's reference to the allegation in its answer that less than 1% of its business was transported by it across state lines and that 93% of petitioner's business is intrastate (Pet'n for Writ, pp. 3 and 6) has little relevancy to the question at issue. "The percentage of the employ-

er's business intrastate as compared with that interstate proves little." (*Fleming v. Jacksonville Paper Co.*, 128 Fed (2d) 395.) The application of the Act is dependent upon the character of the employee's activities. (*Kirschbaum* case, *supra.*)

The fact, if it is a fact, that petitioner "operates almost exclusively within the boundaries of a single state" (Pet'n for Writ, p. 7), gives us no aid, and of course does not exempt petitioner or respondent from under the Act, for we are only concerned with one employee whose activities are admittedly at least 7% engaged in interstate commerce continuously from day to day and week to week throughout his entire employment, and an employer also admittedly so engaged to the average extent of 7% of its total busines [R. 23].

(2) Respondent does not feel that the decision by the Circuit Court of Appeals in the instant case is in any way in conflict with applicable decisions of this Court. Under the rule that a "substantial part" of an employee's activities must relate to goods in interstate commerce before he is covered by the Act (*Walling v. Jacksonville Paper Co.*, 87 S. Ct. 394, 317 U. S. 564), this Court has also stated in the same decision that "the question of the Act's coverage depends on the special facts pertaining to the particular business."

Further along this line this Court said in the *Callus* case, *supra*,

> "When these provisions (of Fair Labor Standards Act) first came here we made it abundantly clear that their enforcement would involve the Courts in the emperic process of drawing lines from case to case, and inevitably nice lines. (*A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. ed. 1638, 62 S. Ct. 1116.)"

Therefore, we should in this case ever keep in mind the type of interstate business performed by petitioner and by respondent in his employment. This Court has held that a rate clerk for a motor transportation company was covered by the Act. (*Overnight Motor Co. v. Missel*, 316 U. S. 512.)

Petitioner takes the District Judge to task for applying what it calls "the principles applicable to the National Labor Relations Act rather than the Fair Labor Standards Act" (Pet'n for Writ, p. 8). However, what the trial judge was doing was properly refusing to apply the general legal maxim "*de minimis non curat lex*" to the facts of this case. That doctrine, of course, when applicable upon the facts, is not confined to any one act, or any particular law or subject matter.

It appears that what petitioner is trying to say is that the *Jacksonville Paper* case, *supra*, and the Circuit Court cases cited by petitioner hold that there must be a substantial part of an employee's activities in interstate commerce; that 7% is not substantial; therefore, the decision of the Circuit Court is wrong. However, petitioner also tries to say that although 7% is not substantial it is also not inconsequential, *i. e.*, it is not unsubstantial, in its attempt to get around arguing that 7% is "*de minimis*" (Pet'n for Writ, p. 12). But petitioner's own cases do not uphold such an incongruous proposition. All cases cited by petitioner agree that a "substantial part" is necessary, and those that go into what amount is necessary to be substantial conclude that if the "*de minimis*" doctrine cannot be applied on the facts, the portion is substantial within the meaning of the *Jacksonville Paper* case.

As to petitioner's point number (2) then, there certainly is no conflict between the instant decision of the

Circuit Court of Appeals and the applicable decisions of this Court, but on the contrary the opinion in the case at bar is directly in line with such applicable cases. The *Jacksonville Paper* case did not hold that 7% is not substantial nor that 7% would be insufficient to bring an employee under the Act; and the *Callus* case turned on whether or not the occupations of plaintiffs were necessary to the production of goods for commerce and in no way held that "substantial part" meant at least 20%, as suggested by petitioner, or any other percentage. "A mathematical formula cannot be set up" (*Kirschbaum* case).

The Circuit Court and District Court cases which have applied the "substantial part" test set down by the *Jacksonville Paper* case and have had to go into the question of amount of interstate activity necessary have defined "substantial part" as meaning something worthwhile or of consequence or of substance as distinguished from something inconsequential, occasional, sporatic or isolated as will be further developed by discussion under the respondent's opposing argument to brief of petitioner.

(3) The Circuit Court of Appeals for the 9th Circuit has not rendered any decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter, in the opinion of respondent.

Of all cases of the Circuit Courts of Appeals cited by Petitioner, respondent is unable to find one that is in conflict with any of the others as far as applyng the rule involved, and, what is far more important none holds that 7% is not substantial; and furthermore, several cited by Petitioner as being in conflict with decisions of the 9th and 10th Circuits specifically point out that the meaning of "substantial" as it is applied under the Act to the

sections involved herein (Sec. 3(b) (29 U. S. C. A. 203(b), and Sec. 7(a) (29 U. S. C. A. 207(a)) means something more than a trifle or something opposite from or more than incidental, sporadic or inconsequential. In other words unsubstantial means *"de minimis."* (*Davis v. Goodman Lumber Co.*, 133 Fed. (2d) 52 (4th Cir.); *James Reuter v. Walling*, 137 Fed. (2d) 315 (5th Cir.); *Schwarz v. Witwer Grocer Co.*, 141 Fed. (2d) 341 (8th Cir.).)

As to the Second Circuit, respondent wishes to add the case of *Phillips v. Star Overall Dry Cleaning Ldy. Co.*, 149 Fed. (2d) 416, decided May 7, 1945, wherein the Court, speaking of the Act, stated on page 418:

> "As it appears that about four per cent of the cleaning and pressing which the appellant did for Star was of garments used in Star's interstate business and that the people were engaged in this work, it is obvious that if this was a production of goods within the statute it was a production of goods for interstate commerce."

As to the cases cited under the Tenth Circuit, respondent wishes to add *Walling v. Peoples Packing Company*, 132 Fed. (2d) 236, decided Dec. 16, 1942, wherein it was held that 6½% to 10% was a "substantial part" and sufficient to bring the plaintiff under the Act.

As to *New Mexico Public Service Company v. Engel*, 145 Fed. (2d) 636, it is interesting to note that it cites with approval several of the cases in various Circuits which decisions Petitioner claims are in conflict with the *New Mexico* case and the case at bar.

To summarize: (1) the business of Petitioner is not a "local business" within the reference by this Court to

exempting such under the Act; (2) the instant decision is not in conflict with opinions by this Court, but on the contrary is directly in line with them, and particularly the *Jacksonville Paper* case; (3) decisions by other Circuit Courts are not in conflict with the case at bar, but apparently all agree with and follow the *Jacksonville Paper* case.

One further matter respondent feels is only fair, because of the appeal to the Circuit Court and petitions herein and because only $150.00 attorney's fees were allowed by the District Court (which obviously did not contemplate appeal work) attorney fees on appeal and on this opposition to Writ of Certiorari should be awarded to respondent. Second Circuit recently allowed $400.00 attorney's fees on appeal. (*Phillips v. Star Overall Dry Cleaning Laundry Co.*, 149 Fed. (2d) 416 (decided May 7, 1945).) This Court has jurisdiction (29 U. S. C. A. 216).

Wherefore, respondent prays that Petitioner take nothing by his Petition for Writ of Certiorari; that a Writ be denied; that attorney's fees on defense to the appeal to the Circuit Court and in opposition to the Petition herein be allowed to respondent with costs.

Respectfully submitted,

GORDON LAWSON,

ALFRED F. BAUGHN,

Attorneys for Respondent.

IN THE

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SOUTHERN CALIFORNIA FREIGHT LINES, a corporation,
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CHARLES T. McKEOWN,

Respondent.

OPPOSING ARGUMENT TO BRIEF OF PETITIONER.

It is respondent's contention that 7% under the facts in the case at bar is a "substantial part" within the meaning of the decisions of this Court, particularly *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and that the Circuit Court cases cited by Petitioner on pages 17 and 18 of his Petition for Writ of Certiorari are directly in line with the Ninth Circuit decision in the instant matter. Therefore, discussion of these will be made in the order in which Petitioner has named them.

In *Walling v. Mutual Wholesale Food & Supply Company*, 141 Fed. (2d) 331 (8th Cir.) decided March 8, 1944, the Court stated at page 340:

> "This Act is remedial and should be liberally construed and applied, *Fleming v. Hawkeye Pearl Button Co.*, 113 Fed. (2d) 52, 56, Eighth Circuit,"

and held that such plaintiff employees as did a substantial amount of interstate activities for any week were within the Act.

The employer in *Walling v. Silver Bros. Co.,* 136 Fed. (2d) 168 (decided May 21, 1943), was a large wholesale grocer whose out-of-state purchases were approximately 2 to 3 per cent of his gross per year. The Court did not explain the division of the plaintiff's activities, but concluded that since the lower court held they were not engaged in interstate commerce "that the District Court must have found that an unsubstantial portion of their employment was in interstate commerce." However, the Circuit Court went on to state that assuming their "activity consumed a substantial portion of their time" it would have to hold that the employees although engaged in interstate commerce would not come under the authority of the Wage & Hour Administrator because of the exemption in Section 13(b)(1) of the Act which brought them under the jurisdiction of the Interstate Commerce Commission.

The Court in *Bracey v. Luray,* 138 Fed. (2d) 8 (decided September 16, 1943), Fourth Circuit, stated at page 10 that the gross sales of defendant "averaged per year only approximately $5,000, or less than 4% of the defendant's total annual gross business." However, the Circuit Court did not have to decide whether less than 4% was substantial, stating on page 12:

> "Since the plaintiffs were engaged in commerce within the meaning of the Act as to practically all of defendant's business, therefore, and not merely as to the 4% embraced in true interstate sales, questions as to allocations of time between interstate and intrastate business need not be considered."

The next Circuit Court case cited by the Petitioner, to-wit: *Crown Overall Mfg. Co. v. Walling,* Sixth Circuit (decided May 7, 1945), cited with approval the *Jacksonville Paper* case, *supra,* and *Walling v. Mutual Wholesale Food, supra,* but no facts as to allocation of the activities of plaintiffs was given.

Likewise there are no facts in *Walling v. Goldblatt Bros.,* 128 Fed. (2d) 778, Seventh Circuit (decided June 25, 1942), as to the division of time spent by the employees involved.

In the Eighth Circuit Court case of *Schwarz v. Witwer Grocery Co.,* 141 Fed. (2d) 341, the employees in the wholesale warehouse only "occasionally" help unload interstate shipments without further proof as to how long or how often they did so, the Court holding that these employees had the burden of proving "that they were engaged in interstate commerce, or that a substantial part of (their) activities were in interstate commerce. They only proved that a *very incidental* part of their activities was in such commerce. They failed to make a case." This just follows the *"de minimis"* rule. (Emphasis added.)

Petitioner is admittedly a common carrier engaged in interstate commerce to the extent of 7% of its total business [R. 22, 23, and Petn. for Writ, p. 2], which is transportation—since appellant is a motor freight line. Respondent was a transportation employee working regularly and continuously for this interstate instrumentality in the very channel and stream of commerce. Thus he should be entitled to benefits of the Act (Buls. No. 1 and No. 5), because there is no delimitation therein on quantity or volume of interstate activities; and judicially the only limitation has been by application of the *"de minimis"* doctrine.

"Substantial part" is a relative and flexible term to be gauged by all the circumstances surrounding the situation. (*Fuhrman v. American N. B. & L. Assn.*, 126 Cal. App. 202.) In so far as amounts or proportions of a given thing or period of time are concerned the word "substantial" may have two different meanings; something worthwhile as distinguished from something without value or merely nominal. (*In re Krause's Estate*, 21 Pac. (2d) 268, 173 Wash. 1.) "That is of moment; important; essential, material;"—(Webster's New Inter'l Unabr. Dict., 2d Ed.) It also may mean "considerable in amount, value or the like; large." (Webster's, *supra.*)

In view of the liberal and wide scope to be given the Act as set forth in the Congressional findings and declarations of policy (Sec. 2 of Act, 29 U. S. C. A., Sec. 202), which have been so frequently emphasized by the courts (*U. S. v. Darby*, 312 U. S. 100, 61 S. Ct. 451; *Fleming v. Hawkeye etc. Co.*, 113 Fed. (2d) 52:—"We must assume that all employees in interstate commerce, so far as reasonably possible, should be made subject to the provisions of the Act"), the proper interpretation, at least where the employee is actually engaged in transportation in interstate commerce, should be, and by most of the cases cited herein, has been to include employees in positions similar to respondent's, and especially here where the employee is not under jurisdiction of the Interstate Commerce Commission because his activities do not "affect safety of operation" [R. 14, 15], but who nevertheless works a part of each day of every week directly on interstate freight items [R. 16, 17, 24, 25]. In this connection and under this situation certainly "substantial" means something worthwhile; something of actual value; some-

thing sufficient to take notice of—more than a *"minimis."* Under this meaning, surely 7% is substantial here.

Respondent contends that 7% is substantial and is sufficient where it is a part of every day of every work-week as here. Where the amount is unsubstantial the doctrine of *"de minimis non curat lex"* is applied, but only to isolated, occasional, infrequent, inconsequential, causal or sporadic activities in interstate commerce. (*James V. Reuter v. Walling,* 137 Fed. (2d) 315, decided July 22, 1943, Fifth Cir.; *Davis v. Goodman Lbr.,* 133 Fed. (2d) 52, Fourth Cir.; *Walling v. Peoples Packing Co.,* 132 Fed. (2d) 236, Tenth Circuit, decided Dec. 16, 1942; *New Mexico Public Service Co. v. Engel,* 145 Fed. (2d) 636, Tenth Cir.; *Berry v. 34 Irving Place Corporation,* D. C. N. Y. 1943, 52 Fed. Supp. 875; *Mile High Poultry Farms v. Frazier,* Colorado Supreme Court (Mar. 5, 1945), 157 Pac. (2d) 125; *McDaniel v. Clavin,* 22 Cal. (2d) 61, 136 P. (2d).)

In the *James V. Reuter* case, *supra,* the Fifth Circuit held that ½ to ⅓ of 1% was a "trifle" and therefore not substantial. The total sales of defendant employer in interstate commerce was 5% but the plaintiff's activities only touched less than 1% of this interstate business.

The employer in the *Davis* case, *supra,* manufactured only certain parts for rollers but performed less than 10% of the manufacture of the total parts thereof, and of the rollers handled by defendant company only 25% were sold outside the state. The Circuit Court said on page 53 that although the roller business was small compared to the proceeds of the retail sales "it was nevertheless substantial; and the manufacturing operations were continuous for two years or more and required the services of at least two workers and a foreman." The two plaintiff workmen in-

volved in this particular activity were *continuously* engaged therein and the Court held they were covered by the Act but that other employees whose contact with the interstate business was only *incidental* were not under the Act because their services in interstate commerce were too unsubstantial. (Emphasis added.)

As previously stated the *Peoples Packing Company* case, *supra,* held that 6½% to 10% was substantial.

The Tenth Circuit Court in the *New Mexico Public Service* case, *supra,* held that 4% was substantial, saying at page 640:

> "If the services he (plaintiff employee) performs are essential to the movement of commerce and not merely *sporadic and isolated,* he is engaged in commerce within the meaning of the Act. *U. S. v. Darby,* 312 U. S. 100; *Walling v. People's Packing Co.,* 132 Fed. (2d) 236; *North Shore v. Barnett,* 143 F. (2d) 172; *Sun Pub. Co. v. Walling,* 140 Fed. (2d) 445," and other cases.
>
> "The generation of electricity for use in the movement of interstate commerce was a part of the *work-a-day duties* of the employee, and his contribution in that respect was both *consistent and continuous.*" (Emphasis added.)

The Supreme Court of Colorado in *Mile-High Poultry Farms, supra,* discusses application of the "substantial part" rule as to percentages and allocation of activities as decided by the Federal courts. It is good and rather exhaustive. There the Court held that "slightly more than 1%" was unsubstantial, and, therefore, the rule *"de minimis"* applied.

The Federal cases therein cited and quoted show that when that portion of the activities in interstate commerce

is "incidental," "inconsequential," "sporadic," "negligible" or "unsubstantial" it does not constitute a substantial part of the employee's work within the meaning of the *Jacksonville Paper* case decision. These words were actually used in the Federal cases cited.

In *Berry v. 34 Irving Place Corporation, supra,* it was held that the phrase "substantial part" as used in the *Jacksonville Paper* case, *supra,* is not a phrase of mathematical precision but is the converse of unsubstantial or immaterial and the word "substantial" as so used does not mean the same as when used in the phrase "substantial performance of a contract."

The California Supreme Court held in the *McDaniel v. Clavin* case, *supra,* that certain transactions in interstate commerce by plaintiff employee were isolated and sporadic and "too inconsequential" to bring him under the Act.

In Conclusion respondent feels that he has proved that a substantial portion of his activities in his employment for petitioner was in interstate commerce, sufficient to bring him under the Act in question, and that the decisions below of the District Court and the Circuit Court are correct and that plaintiff like the rate clerk in *Overnight Motor Company v. Missel,* 316 U. S. 512, is entitled to benefits of the overtime provisions of the Fair Labor Standards Act; and, therefore, respondent respectfully requests this Court to deny the Writ of Certiorari, but if issued, that the decision of the Circuit Court be affirmed, with costs and attorney's fees on appeal to respondent.

Respectfully submitted,

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